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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

PUBLIC COPY

[redacted]

APR 29 2003

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The employment-based visa petition was approved by the Director, California Service Center on September 27, 1997. On May 28, 2002, the director informed the petitioner of his intent to revoke the approved petition. On July 24, 2002, the director revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition remanded for further action and consideration.

The petitioner is a corporation organized in the State of California in September 1995. It is engaged in the import and wholesale of chemical material and equipment. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director initially approved the petition. Upon review of the record and an investigative report from the Bureau's overseas office in Beijing, China the director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the petitioner. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer. The director further determined that the petitioner had not established its ability to pay the beneficiary the proffered wage. The director finally determined that the petitioner had not established that it had been conducting business in a continuous, systematic, and regular manner for the one-year period prior to filing the petition in August of 1997.

Counsel for the petitioner requests oral argument due to the legal issues raised on appeal. However, oral argument is limited to cases where cause is shown. *See* 8 C.F.R. § 103.3(b). It must be shown that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Therefore, the request is denied.

Counsel, in the rebuttal to the director's notice of intent to revoke and on appeal, requests a copy of the overseas investigative report pursuant to 8 C.F.R. § 103(b)(16). The director refused to provide the report citing exemptions found under the Freedom of Information Act regarding release of government held information. However, the director should take note that in accordance with Bureau regulations, a petitioner must be permitted to inspect the record of proceeding which constitutes the basis of an adverse decision. 8 C.F.R. § 103.2(b)(16). If an adverse decision will be based on derogatory information of which the petitioner is unaware, the petitioner must be advised of that evidence and offered an opportunity to rebut it before the decision is rendered. 8 C.F.R. § 103.2(b)(16)(i). Only if the evidence is classified under

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Executive Order No. 12356, 47 Fed. Reg. 14874 (April 6, 1982) may the Bureau decline to provide such evidence in order to protect the information from unauthorized disclosure in the interest of national security. 8 C.F.R. § 103.2(b)(16)(iv).

In this case, the director has not indicated that the evidence is classified under the above Executive Order. Accordingly, the director must permit the petitioner to inspect the record and the adverse evidence on which his decision was based. Where the director's notice of intent to revoke is based upon an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, the denial of the visa petition cannot be sustained. *See Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

Counsel also asserts that the director's decision is arbitrary, capricious, and an abuse of discretion. Counsel further asserts that the director failed to state good and sufficient cause for revocation and failed to take into account the rebuttal evidence submitted.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the

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United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the

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organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially described the beneficiary's job duties as follows:

- to direct the overall management of the USA branch entity;
- to develop company management system and implement company policies and regulations;
- to set overall development directions as well as long and short range goals and objectives;
- to direct and coordinate business activities to obtain optimum efficiency and economy of operations and maximize profit;
- to review and approve funding of various development projects;
- to negotiate and sign up buying/selling and joint-venture contracts; etc.

The petitioner's letter in support of the petition also indicated that the beneficiary's duties included hiring and firing all United States personnel, reviewing and approving promotions and leaves and assigning proper jobs. The petitioner also included brief job descriptions for the positions of vice-president, sales representative, accountant, and secretary/clerk.

The petitioner also provided its organizational chart depicting the beneficiary as president and chief financial officer. The chart depicted a vice-president over five departments. The managerial position for each of the five departments was reflected as unfilled. The petitioner further provided its California Form DE-6, Quarterly Wage and Withholding Report for the quarter ending June 30, 1997. The California Form DE-6 reflected six employees the last month of the quarter. The positions held by the employees on the chart included the beneficiary's position of president, the vice-president, and personnel in the finance department, sales department, and personnel department. On the basis of this limited information, the director approved the petition.

Upon subsequent review of the record, including an investigative report, the director issued a notice of intent to revoke the approval of the petition. The director noted that the description of job duties for the president and vice-president were similar. The director also noted that the record reflected that the president and vice-president oversaw two full-time employees and

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two part-time employees. The director listed a number of California Forms DE-6 and the quarters in which the forms were filed, some which were apparently filed in response to requested information for a Form I-485, Application to Register Permanent Resident or Adjust Status. The director, however, listed California Forms DE-6 in his decision for this employment-based petition that either are no longer in the file or were never in the record. The California Form DE-6 for the quarter in which the petition was filed is not available in the record. The next California Form DE-6 available in the record is for the quarter ending June 30, 1998. The California Form DE-6 for this quarter reflects two employees in the position of president and vice-president.[1] The director also inaccurately stated that the petitioner had not paid the beneficiary until the first quarter of 1998.

The director determined that the petitioning entity did not have a reasonable need for an executive because it was only involved in the import and sale of products. The director also determined that the beneficiary was in essence a first-line supervisor over non-managerial and non-professional employees. The director further determined that the beneficiary was not a functional manager but rather was and would be involved in performing routine operational activities rather than managing a function of the business.

In rebuttal to the director's notice of intent to revoke, counsel for the petitioner asserted that the director's notice implied that a small business is not statutorily qualified to file a visa petition pursuant to section 203(b)(1)(C) of the Act. Counsel also noted that the director did not specify the tasks performed by the beneficiary that precluded the beneficiary from performing managerial or executive duties. Counsel asserted that the director applied a new and different interpretation of "functional manager" when determining the beneficiary must manage positions that require professional employees. Counsel further asserted that the director's notice of intent to revoke, issued five years after the approval of the petition, would constitute extreme hardship to the beneficiary and his family. Counsel finally asserted that the notice of intent to revoke issued five years after approval, without explanation, estops the director from revoking the approval.

The record contains the director's revocation decision noting in the first paragraph that the decision is in reference to the petition filed on behalf of the beneficiary. However, in other places in the decision, the director refers to the vice-president and her position in the petitioning organization. The director

[1] The record does not contain California Forms DE-6 for the quarters ending September 1997 and December 1997. The most pertinent California Form DE-6 for this petition is the September 30, 1997 form establishing the number of the petitioner's employees at the time the petition was filed.

re-states the information contained in the notice of intent to revoke, acknowledges receipt of certain evidence, and concludes that the petitioner has not provided evidence that overcomes the intent to revoke.

On appeal, counsel repeats the assertions set forth in the rebuttal to the director's notice of intent to revoke.

Counsel's assertion regarding the beneficiary and his family's hardship and the assertion that the Bureau is estopped from revoking a petition five years after approval of the petition are not persuasive. The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of the Bureau from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted through the regulations at 8 C.F.R. § 103.1(f)(3)(iii). Accordingly, the Bureau has no authority to address the petitioner's equitable estoppel claim.

Regarding the merits of the director's decision and the subsequent appeal, the director's decision must be withdrawn and the case remanded to the director for a new decision. The director must address the following issues after giving the petitioner the opportunity to submit evidence addressing these issues.

It is not clear from the director's decision whether the director analyzed the beneficiary's duties or whether the director analyzed the duties of the vice-president when making his determination on the issue of manager and executive capacity. The director must clearly refer to the beneficiary of this petition and the duties set out for this beneficiary in his decision.

The AAO notes that the petitioner provided a brief job description for the beneficiary's position and that the description is similar to the description for the position of vice-president. As noted above, this record does not currently contain a California Form DE-6 for the quarter in which the petition was filed. The petitioner has presented no other evidence establishing the number of individuals employed by the petitioner at the time the petition was filed. It is not possible to determine from the general description provided and the remaining information in the record that the beneficiary is primarily performing managerial or executive duties for the petitioner rather than primarily performing the actual and necessary operational tasks of the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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Of further note, the director's statement that the petitioner does not need an executive because it is only an import and sales business is subjective and is not an appropriate basis for the director's revocation decision on this issue. The director should not hold a petitioner to his undefined and unsupported view of "common business practice" or "standard business logic." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from qualifying for classification under section 203(b)(1)(C) of the Act.

The second issue in this proceeding is whether the petitioner established a qualifying relationship with the beneficiary's overseas employer.

The petitioner claims that it is a wholly-owned subsidiary of the beneficiary's overseas employer. The petitioner has provided a stock certificate issued to the beneficiary's overseas employer and its stock ledger confirming the issuance of this stock certificate and reflecting no other stock transactions. The petitioner has also provided its notice of transaction to be filed with the California Commissioner of Corporations. The Notice of Transaction indicates that $110,000 in money was paid for the securities issued. There is no indication on the Notice of Transaction that this document was filed with the California Commissioner of Corporations. The petitioner further provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 1997, covering the petitioner's fiscal year beginning July 1, 1997 and ending June 30, 1998. The IRS Form 1120 on Schedule K seems to confirm that the beneficiary's overseas employer owns 100 percent of the petitioner.

The Bureau's Beijing office also confirms that "a business relationship between [the beneficiary's overseas employer] and [the petitioner] actually exists" in the investigative report submitted. The investigator notes that the beneficiary owns 25 percent of his overseas employer. The report does not further detail the ownership of either the beneficiary's overseas employer or the petitioner. The investigator states in the report that the general manager of the beneficiary's overseas employer had invested $200,000 to set up the petitioner.

The director questioned whether the beneficiary's overseas employer had actually paid for the shares issued to it. The director noted that the petitioner had not submitted bank statements or other evidence to demonstrate that the petitioner had contributed capital for the issuance of the stock in November of 1995. On appeal,

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counsel for the petitioner indicates that an individual and another company have made "payments due the parent company in the United States." Counsel submits an agency agreement between the beneficiary's overseas employer and another company to wire transfer payments to the beneficiary's overseas employer's overseas account. The agreement is dated October 4, 1996. It is not clear from the record how this agreement is pertinent to the beneficiary's overseas employer's purchase of the initial stock in the petitioner.

Although it appears that the petitioner may have a qualifying relationship with the beneficiary's overseas employer, the director's determination that the evidence submitted does not establish the actual payment by the foreign entity for the petitioner's stock is correct. The director is well within his authority to request information establishing payment for the stock when questions arise regarding the legitimacy of the qualifying relationship. *See* 8 C.F.R. 204.5(j)(3)(ii). In this instance, the petitioner should be given an opportunity to provide evidence of the foreign entity's payment for the stock or a reasonable explanation why the evidence cannot be provided.

The third issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of $30,000 per year. As noted above, the petition was filed in August of 1997. The petitioner provided its 1997 IRS Form 1120, for its fiscal year beginning July 31, 1997 and ending June 30, 1998. The IRS Form 1120 showed the beneficiary was paid $36,857 as an officer of the petitioner. The IRS Form 1120 also showed a net taxable income of $7,440 for the petitioner's taxable year. The petitioner also provided two California Forms DE-6 for the quarters ending March 30, 1997 and June 30, 1997 showing that the beneficiary was paid $6,600 for each of those quarters. The petitioner also provided the beneficiary's IRS Form 1040A, U.S. Individual Tax Return for the 1998 year. The IRS Form 1040A reflected the beneficiary's wages as $30,689. The attached IRS Form W-2, Wage and Tax Statement that the petitioner issued to the beneficiary for the year 1998 reflected it had paid $28,526.10 to the beneficiary. The record is not complete in establishing that the petitioner has the ability to pay the beneficiary the proffered wage. The Bureau will consider the petitioner's net taxable income for the pertinent year to determine whether the petitioner has the ability to pay the beneficiary the proffered wage. The Bureau will also consider whether the petitioner has actually paid the beneficiary the proffered wage in the past. In this instance, the amount the beneficiary was actually compensated for the 1997 calendar year has not been shown. The petitioner should be given the opportunity to supply this pertinent information.

The last issue in this proceeding is whether the petitioner has established it was doing business for one-year prior to the filing of the petition.

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The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

As noted by the director, the petitioner has not provided sufficient information that it is engaged in providing goods and/or services in a regular, systematic, and continuous fashion. The AAO notes that the petitioner has submitted its IRS Form 1120 for its fiscal year beginning July 1, 1996 and ending June 30, 1997. This IRS Form 1120 encompasses the one-year prior to filing the petition. The IRS Form 1120 reveals gross receipts in the amount of $1,021,179 and cost of goods in the amount of $923,457. Although this IRS Form 1120 is signed on behalf of the petitioner, there is no evidence the return was actually filed with the Internal Revenue Service. In addition, some indication of the goods bought and sold by the petitioner in the form of invoices, bills of lading, and other appropriate custom documents as the director might request would greatly contribute to an understanding of the petitioner's business and whether the petitioner was engaged in the regular, systematic, and continuous provision of goods and/or services for the one-year period prior to filing the petition. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

This matter will be remanded for the purpose of a new decision on each of the four above issues. The director must afford the petitioner reasonable time to obtain the evidence described above, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

ORDER: The director's decision of July 24, 2002 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.